

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 20 January 2012

BALCA Case No.: 2010-PER-01555

ETA Case No.: A-07249-72698

In the Matter of:

AFFILIATED COMPUTER SERVICES, INC.,

Employer

on behalf of

ANNIRUDH SINGH,

Alien.

Certifying Officer: William L. Carlson
Atlanta National Processing Center

Appearances: Paige L. Taylor, Esquire
Dallas, Texas
For the Employer

Gary M. Buff, Associate Solicitor
Clarette H. Yen, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, D.C.
For the Certifying Officer

Before: Romero, Avery, and Kennington
Administrative Law Judges

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and the “PERM” regulations found at Title 20, Part 656 of the Code of Federal Regulations (C.F.R.).

BACKGROUND

On February 20, 2008, the Certifying Officer (CO) accepted for processing Employer's Application for Permanent Employment Certification (ETA Form 9089) for the position of "Functional Analyst." (AF 81-93).¹ Because the application was for a professional position, Employer listed three types of professional recruitment, one of which was an employee referral program with incentives. (AF 85).

On April 15, 2008, the CO notified Employer that its ETA Form 9089 was selected for audit. (AF 78-80). Among other documentation, the CO directed the Employer to submit its recruitment documentation. (AF 78). Employer responded on May 12, 2008. (AF 34-77). As documentation of its employee referral program, Employer provided a print out of the job opportunity. Employer indicated that the print out was posted in accordance with its referral program. (AF 62, 68-69). On March 16, 2010, the CO denied certification of Employer's application on the ground that Employer failed to provide adequate documentation of the employee referral program as required by 20 C.F.R. § 656.17(e)(1)(ii)(G). (AF 31-33).

Employer requested reconsideration on April 13, 2010. (AF 3-77). Employer argued that the use of the permissive "can" in 20 C.F.R. § 656.17(e)(1)(ii)(G) indicated that the regulations do not require specific documentation of the incentive program. (AF 4).

On September 3, 2010, the CO issued a letter of reconsideration. The CO determined Employer's request did not overcome the deficiency stated in the determination letter because Employer failed to document a logical nexus between its referral program and its recruitment efforts. Therefore, the CO determined that the reason for denial was valid pursuant to 20 C.F.R. § 656.17(e)(1)(ii)(G) and thus forwarded the case to BALCA. (AF 1-2).

On November 5, 2010, BALCA issued a Notice of Docketing. Employer filed a Statement of Intent to Proceed on November 12, 2010. On December 22, 2010, the CO filed a Statement of Position requesting affirmation of the CO's denial of labor certification.

¹ In this decision, AF is an abbreviation for Appeal File.

DISCUSSION

Under 20 C.F.R. § 656.17(e)(1)(ii), one of the additional recruitment steps an employer can utilize in advertising a professional occupation is an employee referral program with incentives. This step “can be documented by providing dated copies of employer notices or memoranda advertising the program and specifying the incentives offered.” 20 C.F.R. § 656.17(e)(1)(ii)(G).

The regulations require an employer to maintain all supporting documentation of all recruitment steps taken and all attestations made in the application for labor certification for five years. 20 C.F.R. §§ 656.10(f), 656.17(a)(3), 656.17(e)(1). A substantial failure by an employer to provide the documentation required by the audit will result in the application for permanent labor certification being denied. 20 C.F.R. § 656.20(b).

The Board has stated that while 20 C.F.R. § 656.17(e)(1)(ii)(G) uses the permissive “can” rather than “shall,” the regulation nonetheless, “notifies employers that the specifics of the program’s incentives, and the dates that the program was advertised, are elements of adequate documentation.” *Ove Arup & Partners Consulting Engineers, PC*, 2010-PER-00013, slip op. at 7 (July 20, 2010). Thus, the Board held that documentation of a referral program is insufficient where it does not provide the basic information identified in the regulation. *Id.* at 8.

In the instant case, the CO properly found that Employer failed to comply with the regulations by failing to provide adequate documentation of the incentives offered in the employee referral program. The print out is dated, but it does not identify the incentives offered. Therefore, the documentation of the referral program provided by Employer is insufficient because it does not provide the basic information identified in the regulation.

Based on the foregoing, we affirm the CO’s denial of labor certification.

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **AFFIRMED**.

For the Panel:

A

Lee J. Romero, Jr.
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition, the Board may order briefs.